

STATE OF NORTH DAKOTA
COMMISSIONER OF INSURANCE

IN THE MATTER OF:

United American Insurance Company
Rate Increase Disapproval

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**RECOMMENDED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

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On April 7, 2000, United American Insurance Company (“United”) filed with the Department of Insurance (“Department”) seven requests or applications for increased premiums for seven different Medicare supplement health insurance plans that United sells in North Dakota. Exhibit 1 (each request was filed under a separate “Policy, Form, and Rate Filing Transmittal Form ND 1000 SFN 51679 (5/98)”). These filings cover standard forms A, B, C, D, F, G and DB. *Id.* See Exhibit 3. On the actual form, the policies are referred to as “MSA, MSB,...MSG,” and “DMSB.” Exhibit 1. The retained actuary for the Department reviewed the seven requests along with supporting actuarial memorandums for each of the seven plans. On April 28, 2000, the Department denied all seven of United’s requests. On May 26, 2000, United petitioned for administrative review of the denials.

On June 5, 2000, the Department requested the designation of an administrative law judge (“ALJ”) from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order to the Commissioner of Insurance (“Commissioner”), who has the final decision making authority with regard to United’s seven requests. On June 7, 2000, the undersigned ALJ was designated.

On May 26, 2000, United filed a Petition to Obtain Discovery. On June 5, 2000, the Department responded to the petition. On June 19, 2000, the ALJ issued an Order on Discovery and a Notice of Prehearing Conference. The ALJ held a telephone prehearing conference as scheduled on June 28, 2000. The parties engaged in some discovery. On August 15, 2000, the ALJ issued a Notice of Hearing, scheduling a September 15, 2000, hearing in the Fort Union Room of the State Capitol, Bismarck, North Dakota.

The hearing was held as scheduled on September 15. Mr. Frank J. Santry of Tallahassee, Florida appeared representing United. Special Assistant Attorney General Charles E. Johnson appeared representing the Department. The Department called one witness, its contract actuary, Mr. Thomas C. Foley of Kansas. United called one witness, an expert witness, an actuary, Mr. Mark E. Litow of Wisconsin. Ten exhibits were offered and admitted. United offered exhibits 1, 1a, 2 (jointly with the Department), 8, and 9. The Department offered exhibits 2 (jointly with United), 3, 4, 5, 6, and 7. The Department offered the entire HICFA 2000 Guide on Medicare; upon objection, the ALJ admitted only page 10 of the Guide (exhibit 3).

United requested a transcript which was prepared and made available to the ALJ and the parties on October 2, 2000. Subsequently, the parties filed briefs. On October 16, 2000, United filed Petitioner's Initial Post-Hearing Brief. On October 25, 2000, the Department filed Respondent's Reply Brief to Petitioner's Initial Post-Hearing Brief. After requesting and receiving an extension, United filed its Petitioner's Post Hearing Reply Brief on November 14, 2000.

FINDINGS OF FACT

1. For purposes of this matter, Medicare supplement health insurance plans in North Dakota are governed under two statutes and one rule.

N.D.C.C. § 26.1-30-19 states, in part, as follows:

26.1-30-19. Policy forms to be filed with and approved by commissioner.

1. No insurance policy, contract, agreement, or rate schedule may be issued or delivered in this state until the form of that policy ... or rate schedule has been filed with and approved by the commissioner.
2. No life insurance policy, certificate, contract, or agreement or annuity contract may be issued for delivery or delivered to any person in this state nor may any application ... be used in connection therewith until the form thereof has been filed with and approved by the commissioner and is in compliance with chapters 26.1-33, 26.1-34, 26.1-35, and 26.1-37.
3. No insurance policy, certificate, contract, or agreement or notice of proposed insurance against loss or expense from the sickness, bodily injury, or death by accident of the insured may be issued for delivery or delivered to any person in this state nor may any application, rider, or endorsement be used in connection therewith until the form thereof and the classification of risks and the premium rates ... have been filed with and approved by the commissioner. A form must be disapproved if the benefits provided are unreasonable in relation to the premium charge or if the benefits do not comply with chapters 26.1-36 and 26.1-37.

(Emphasis supplied.)

N.D.C.C. § 26.1-36.1-04 states as follows:

26.1-36.1-04. Medicare supplement policy loss ratio standards.

Medicare supplement policies must return benefits to individual policyholders in the aggregate of not less than sixty-five percent of premium received. The commissioner shall adopt rules to establish minimum standards for medicare supplement policy loss ratios on the basis of incurred claims experience and earned premiums for the entire period for which rates are computed to provide coverage and in accordance with accepted actuarial principles and practices.

N.D. Admin. Code § 45-06-01.1-11 provides for the loss ratio standards and the refund or credit of premium calculations in administrative rule. The loss ratio provisions of the rule state, in part, as follows:

45-06-01.1-11. Loss ratio standards and refund or credit of premium.

1. Loss ratio standards:

- a. (1) A medicare supplement policy form or certificate form may not be delivered or issued for delivery unless the policy form or certificate form can be expected, as estimated for the entire period for which rates are computed to provide coverage, to return to policyholders and certificate holders in the form of aggregate benefits (not including anticipated refunds or credits) provided under the policy form or certificate form:

- (b) At least sixty-five percent of the aggregate amount of premiums earned in the case of individual policies;

- (2) Calculated on the basis of incurred claims experience ... and earned premiums for such period and in accordance with accepted actuarial principles and practices.

- b. All filings of rates and rating schedules must demonstrate that expected claims in relation to premiums comply with the requirements of this section when combined with actual experience to date. Filings of rate revisions must also demonstrate that the anticipated loss ratio over the entire future period for which the revised rates are computed to provide coverage can be expected to meet the appropriate loss ratio standards.

2. United began selling Medicare supplement health insurance plans in North Dakota in 1992. (Hereinafter, the seven plans that are the subject of this hearing are collectively referred to as “the Medicare plans;” if referred to individually, they will be referred to as “Medicare A,” “Medicare B,” *etc.*)

3. The Medicare plans are standard form Medicare supplement plans, with each providing the basic reimbursement for certain noncovered amounts for Medicare A (hospitalization) and Medicare B (physician and other services). Thereafter, the Medicare plans

differ very little in the benefits provided as shown on Exhibit 3. The Medicare plans are sold to North Dakota retirees or disabled persons.

4. United currently has a total 763 policies of the Medicare plans in force in North Dakota. Nationwide, United has a total of 254,515 such policies in force. Some of the Medicare plans have very few policies in force in North Dakota (*e.g.*, Medicare A has 15 plans in force, Medicare D has 4 plans in force, Medicare G has 9 plans in force).

5. On April 7, 2000, United filed with the Department seven requests to increase premiums (proposed amount of rate change) for the Medicare plans. Exhibit 1. The requested increases are for both renewal business on policies already sold and for new business on policies to be sold under each type of plan. The requested increases vary from 18.7% to 69.3% on renewal business, and from 18.3 % to 65.5% on new business. *Id.* In total, United seeks premium increases of approximately \$360,000 annually for the Medicare plans. Exhibit 7; see exhibit 1.

6. When United filed its seven requests, it filed part of its request for Medicare B in error. Exhibit 1a, which the Department did not have when it denied the requests but which the Department became aware of prior to the hearing, shows the correct North Dakota Loss Ratio Experience from Inception for Medicare B. Therefore, exhibit 6, not exhibit 5 is the correct summary of loss ratio experience exhibit for United's seven Medicare plans.

7. In North Dakota since inception in 1992, United's filings show that United collected \$4,839,300 in premiums and paid \$3,086,951 in claims. The ratio of claims paid to premiums earned with these correct numbers is .637. Exhibit 6. The ratio of claims paid to premiums earned as shown in the original filings is .569. Exhibit 5. Again, the ratio found in Exhibit 5 is not correct. The ratio of claims paid to premiums earned is referred to as the loss

ratio. The loss ratio varies for each of the Medicare plans. However, each separate plan has lower than a 65 % loss ratio in North Dakota from 1992-1999, except Medicare D and Medicare G, which have a loss ratio of 1.027 and .990, respectively, in North Dakota. See each separate filing in exhibit 1 and exhibit 1a.

8. United's filings show that Medicare plans A, B, C, F, and D-B have generated a total premium reserve surplus in North Dakota of \$272,739 over and above the 65% minimum loss ratio. The surplus is the amount by which 65% of the premiums collected to date exceeds the claims paid to date for all five of the plans. However, Medicare D and Medicare G filings collectively show a reserve deficiency in North Dakota of \$64,416. Thus, overall, for all the Medicare plans there is a total premium surplus in North Dakota of \$208,323 for the period from 1992-1999. United has had the use of premium surplus throughout the life of the plan.

9. United made each rate increase request in a separate filing, each supported by its own historical data and actuarial projections of future experience. United made its filings and based its requests for premium increases for each of the Medicare plans, despite total North Dakota premium surplus, based on nationwide loss ratio experience from inception and projected for the entire future period for which the revised rates are computed to provide coverage.

10. The retained actuary for the Department, Mr. Tom Foley, reviewed United's seven requests. On April 28, 2000, the Department issued a letter denying the requests for rate increases for each of the Medicare plans on the basis that "[t]he developing loss experience does not warrant a rate increase at this time."

11. "Actuarial principles and practices are those derived from the professional actuarial literature or from their common use by actuaries. Actuarial principles and practices are generally accepted when they are consistent with the practices described in the Actuarial

Standards of Practice (ASOPs) adopted by the Actuarial Standards Board (ASB) and to the degree that they are established by precedent or common usage.” Exhibit 2, at 32, line 7. This is a definition of accepted actuarial principles and practices offered by United, agreed upon by Mr. Foley.

12. The hearing record does not contain any evidence that any of the Medicare plans’ rate increases, based on United’s filings, failed to meet the applicable loss ratio test of the statute and rules. See N.D.C.C. § 26,1-36.1-04; N.D. Admin. Code § 45-06-01.1-11. Mr. Foley, an actuary, the Department’s only witness at the hearing, testified that the filings contained no calculation errors (except for the error now corrected by exhibit 1a). He further testified that there were no problems with the lapse rate assumptions that would suggest that the projected loss ratios in the filings were too high. He further testified that there were no problems with United’s trend assumptions. He indicated that the format of the filings and the actuarial methodologies employed met accepted actuarial practices and procedures. Mr. Litow, an actuary, United’s only witness at the hearing, concurred with Mr. Foley in that he found no calculation errors in the filings; that the filings used the correct persistency and trend assumptions and properly employed the trend assumptions. Contrary to Mr. Foley, however, Mr. Litow testified there was complete consistency between the company’s past performance records and its projections of future performance. Mr. Litow substantiated his testimony by reference to the actuarial effect of accepted rate filing methodology. Mr. Litow testified that he would not give the North Dakota experience full credibility. However, Mr. Litow testified that even if he gave North Dakota experience 100 percent credibility and looked at the relationship of North Dakota experience to nationwide data, North Dakota experience was running at approximately 84 percent of nationwide experience. He then testified that if one adjusted the nationwide experience of each

plan in Exhibit 9, by this 84 percent factor, the resulting lifetime loss ratio still exceeds the 65% standard for every form. Mr. Foley gave the North Dakota experience full credibility but did not consider the nationwide data. He appeared to base his determination to recommend denial of each of the requests not on the applicable loss ratio tests of the applicable statutes and rules but on a reasonableness test of whether or not premium increases for all of the Medicare plans are reasonable in light of the aggregate benefits of all of the plans already paid by United to North Dakota policyholders. *See* N.D.C.C. § 26.1-30-19.

13. Mr. Foley's sole criticism of United's filings, that there is an inconsistency between United's North Dakota payment of benefits experience to date and its projections of future experience was clarified at the hearing by Mr. Litow. Generally accepted actuarial practices and procedures require that rate analysis for rate increases be structured applying the assumption that no new policies will be sold after the effective date of the increase. Mr. Litow testified that the lack of first and second-year issues in the two years immediately after the effective date of the rate increase would result in a jump in the loss ratio, on that basis alone. Additionally, he testified that, on issue age policies (all of the Medicare plans are issue age policies), the aging of the insured population would also result in another rise in experience. This is commonplace, Mr. Litow testified, and as much as a 7-8% differential is to be expected on that factor alone. However, Mr. Litow also testified that issue age policies are generally more favorable than attained age policies. Most insurance policies sold by other insurance companies in North Dakota are attained age policies. Mr. Litow explained in uncontroverted testimony why issue age policies are more favorable.

14. One of the fact issues presented at the hearing is whether the experience of the policy forms in North Dakota is actuarially credible as a basis to project future experience. It

appears that there is no controversy that the North Dakota experience on any one given form of the seven forms at issue is insufficient to be actuarially credible to any degree. Thus, the Department considered the North Dakota experience of all of the Medicare plans (all seven) in the aggregate. See COL #4, *infra*.

15. Both Mr. Foley and Mr. Litow confirmed that to accurately use nationwide data to project experience in a single state, the nationwide rates would have to be adjusted to reflect the existing approved rate and future requested rate in the state in which the rate increase request was pending. Although Mr. Foley did not perform any such calculation, Mr. Litow did. He determined that the loss ratio attributable to United applying North Dakota rates on a nationwide basis exceeded the minimum loss ratio requirements of North Dakota law. In fact, Mr. Litow testified that the requested rate increases in North Dakota were much lower than the company could have justified by the use of credible experience.

16. Other companies in North Dakota charge higher rates in North Dakota than those requested by United for identical policy forms and the Department has approved those rates. Each of these other companies in North Dakota have had their rates on the standard forms approved by the Department on the basis that their lifetime loss ratio and future loss ratio will meet the 65% standard of North Dakota law.

17. Contrary to what the Department originally thought, United's current North Dakota rates for its Medicare plans are not among the highest of those companies offering similar products in North Dakota. In fact, United's current rates are among the lowest of those companies offering similar Medicare supplement products in North Dakota. In fact, United's current rates for its issue age policies are most often lower than the rates offered by other companies for the less favorable attained age policies. The evidence shows that if the

Department had approved United's requested rates, United's rates would have still been within the range of rates already approved for North Dakota by the Department for other standard form Medicare supplement plans.

CONCLUSIONS OF LAW

1. The specific standards for reviewing and approving rate increases on Medicare supplement policies are found in N.D.C.C. § 26.1-36.1-04 and N.D. Admin. Code § 45-06-01.1-11. Although N.D.C.C. § 26.1-30-19(3) seems to impose an overall, general reasonableness standard (*i.e.*, the benefits provided must not be unreasonable compared to the premium charged), that rather vague, general standard is not applicable in this matter. The reasonableness of all Medicare supplement policies, including the Medicare plans that are the subject of this hearing, *i.e.*, the standards for such plans, in regard to reviewing and approving rate increases, is specifically defined by N.D.C.C. § 26.1-36.1-04 and N.D. Admin. Code § 45-06-01.1-11.

2. N.D.C.C. § 26.1-36.1-04 appears under a specific chapter entitled "Medicare Supplement Policies" (ch. 26.1-36.1). The title of § 26.1-36.1-04 is "Medicare supplement policy loss ratio standards." (Emphasis supplied.) In the Department's administrative rules, under the article title, "Accident and Health Insurance," there is a chapter entitled, "Medicare Supplement Insurance Minimum Standards." N.D. Admin. Code art. 45-06; N.D. Admin. Code ch. 45-06-01.1. (Emphasis supplied.) This chapter enumerates many standards including the specific "Loss ratio standards" found in N.D. Admin. Code § 45-06-01.1-11(1). (Emphasis supplied.)

3. The Legislative Assembly has given no other specific standards or guidelines of reasonableness by which to judge loss ratios for Medicare supplement policies. The Department in its own rules has given no other specific standards or guidelines. If other standards or

guidelines are desirable, legislative and rulemaking remedies must be pursued. It is inappropriate, *i.e.*, it is arbitrary, when there have been imposed specific statutory and regulatory standards on the Medicare plans, and then, though the plans are acceptable under those specific standards, to also impose a rather vague, general reasonableness standard in the law to state a basis for denial of those same plans. If there were no specific standards for reviewing the appropriateness, *i.e.*, the reasonableness, of Medicare supplement rate increases to be found in statute and rule, then imposing the general reasonableness standard of N.D.C.C. § 26.1-30-19(3) may be appropriate. Under the law and the facts in this matter, however, neither the Department nor the Commissioner has such discretion. In other words, the general reasonableness standard of § 26.1-30-19 is further enumerated by the more specific statute and the more specific rule. The standards are, in effect, already defined for this matter. Neither the Department nor Commissioner may apply other ideas of fairness or reasonableness in this matter because the standards are already provided by statute and rule.

4. The evidence and the law show that aggregating the North Dakota experience of all seven Medicare plans was inappropriate. It is unreasonable and contrary to the law to aggregate the experience of the plans for rate increase purposes yet premise refunds on individual experience. It appears that in every way the Medicare plans are individual, separate, except that the Department interprets the use of the word aggregate in the law to allow aggregation of North Dakota experience from all seven of the plans for rate increase purposes. The word “aggregate” in the applicable law is not used in a way to support the Department’s interpretation. See N.D.C.C. § 26.1-36.1-04 and N.D. Admin. Code § 45-06-01.1-11. It is more credible and acceptable under the law to consider nationwide experience for each of the

individual Medicare plans, separately, or to factor nationwide experience in light of the North Dakota experience.

5. Under accepted actuarial principles and practices, as mandated by law, United has made application for the rate increases it seeks for the Medicare plans. It has established a *prima facie* case for rate increase approval, notwithstanding appearances that in some respects the rate increases may be unnecessary or unjustified. The Department has offered no evidence that under the applicable law the rate increases may be denied. The rate increases may not be denied applying general reasonableness standards found in N.D.C.C. § 26.1-30-19(3). The standards by which to judge the rate increases are defined by specific statute and rule. United has demonstrated a case of compliance and the Department has not rebutted that case in fact or law.

6. The record in this matter contains ample evidence of a *prima facie* case by United that goes unchallenged by the Department, under the appropriate law to be applied. Thus, the Commissioner must approve the requested rate increases for the Medicare plans. *See Insurance Service Office v. Knutson*, 283 N.W.2d 395 (ND 1979). Although the Department claims that United's *prima facie* case is challenged by a statutory general reasonableness standard that the Commissioner may apply in his discretion, the law does not support that view. Any applicable general reasonableness standard is specifically enumerated under other applicable law. The Commissioner may not supplant the specifically enumerated law defining what are the standards, *i.e.*, what is reasonable with regard to loss ratios, with the Department's or his own ideas of a standard of reasonableness under the general law. To apply a general reasonableness standard would result in the making of an arbitrary decision in the face of clear, specific applicable standards that should have been applied. Again, under the applicable law, there is nothing in the record upon which to rebut United's *prima facie* case for approval. The Department has not

submitted any competent evidence establishing a deficiency in United's requests for increases, or the filings upon which they are based. Neither has the Department met its burden of showing credible evidence in the record under applicable law justifying its disapproval. Accordingly, the Department's disapproval should be reversed.

7. Perhaps the reason that the Department provides no competent evidence under the applicable law is that the Department wishes to apply the wrong law. Besides impermissibly using a general reasonableness approach, the Department would rely exclusively on loss ratio histories of the Medicare plans from inception of the policies to the present. This is clearly contrary to the applicable law that requires relying on the loss ratio histories over the lifetime of the policy and over the entire future period for which revised rates are computed. N.D. Admin. Code § 45-06-01.1-11. It is not part of the standard that the 65% loss ratio has been met in the past or for each year in the past or in the future. The Department's approach has been repudiated by the North Dakota Supreme Court:

Insurance rate regulation must, by necessity, involve projections into the future, some of which will not always prove to be accurate. The public interest, however, is not served by arbitrarily denying or delaying rate revisions until the test of time proves the accuracy of the projections.

Insurance Services Office v. Knudson, supra at 400.

8. At the hearing, even the Department's witness, Mr. Foley, and its attorney, conceded the exclusiveness of the standards for rate filing review. It was only after the hearing that the argument under N.D.C.C. § 26.1-30-19(3) was advanced. Again, that argument is not appropriate to apply in this matter.

RECOMMENDED ORDER

The greater weight of the evidence shows that United's seven requests (applications) for rate increases for the Medicare plans are supported by evidence of compliance with the

applicable law, and the Department has offered no evidence to rebut United's evidence under the applicable law. The law does not support the Department's application of N.D.C.C. § 26.1-30-19 to the seven requests, under which the Department alleges that it does provide evidence of noncompliance. Therefore, it is ORDERED that the Department's disapproval of the requested seven rate increases of the Medicare plans is REVERSED and approval is GRANTED for all seven requests effective immediately.

Dated at Bismarck, North Dakota, this 24th day of November, 2000.

State of North Dakota
Glenn Pomeroy
Commissioner of Insurance

By: _____
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